UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FORD MOTOR COMPANY
Respondent

Case 07-CA-198075

and

LOCAL 324, INTERNATIONAL UNION OF OPERATING ENGINEERS (IUOE), AFL-CIO
Charging Party

and

LOCAL 245, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO
Intervenor
_____/

CHARGING PARTY'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

The Charging Party, Local 324, International Union of Operating Engineers (IUOE), AFL-CIO, (herein Local 324 or Charging Party Union) respectfully submits this brief to Administrative Law Judge David I. Goldman, who heard this case on November 6, 7, and 8, 2017 in Detroit, Michigan.

FACTS[1]

The facts of this case are not in material dispute; the dispute among the parties is largely with respect to the legal significance attached to the facts.

History of the Drivability Test Facility

The Drivability Test Facility (DTF), a three level two hundred thousand square feet automobile testing building in Allen Park, Michigan was built in about 1999 and owned by Sverdup Company, a subsidiary of Jacobs Worldwide. (Tr 166, 356; R Ex 1, p 2) The DTF operated wind tunnels known to Respondent as numbers 6, 7, and 8. Other wind tunnels in earlier operation were referred to as numbers 1 through 5. (Tr 354) Work at wind tunnels 1 and 2 ceased around the time that the DTF opened. (Tr 358) Wind tunnels 6, 7 and 8 are at DTF in Allen Park, Michigan, while wind tunnels 3, 4, and 5 are at the test track in Dearborn, Michigan.[2] Maintenance work at wind tunnels 5, 6 and 7 was performed by the Charging Party Union and maintenance work at wind tunnels 3, 4, and 5 was performed by Intervenor. This dual parallel representation existed from about 2000 to 2017.

From the opening of the DTF the Charging Party Union had a collective bargaining

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[1] The facts set forth herein are those the Charging Party contends should be credited. Contrary facts, issues related to credibility and legal arguments are set forth below in Argument.

References to the transcript are abbreviated as Tr; references to the General Counsel Exhibits, Respondent Exhibits, Intervenor Exhibits and Charging Party Exhibits are abbreviated as GC Ex, Resp Ex, I Ex and CP Ex, respectively.

[2] The test track and wind tunnels 3, 4, and 5 are shown on Intervenor's Exhibit 2 and Charging Party Exhibit 1.

agreement for maintenance work, including general maintenance, and maintenance related to refrigeration, heating and air conditioning machinery. Thus the Charging Party had continuous representation of employees from about 2000 to 2017, through four employers and five successive collective bargaining agreements. There was a collective bargaining agreement between Siemens Building Technologies, Inc. Facility Management Services and the Charging Party Union[3] effective from September 1, 2000 to June 30, 2003 (GC Ex 25); there was a collective bargaining agreement between Emcor Facility Services and the Charging Party Union from July 1, 2003 to June 30, 2006 (GC Ex 26). There were collective bargaining agreements between Jacobs Constructors, and/or Jacobs Industrial Services and the Charging Party Union from July 1, 2006 to June 30, 2010 (GC Ex 15); July 1, 2010 to June 30, 2012 (GC Ex 16) July 1, 2013 to June 30, 2016 (GC Ex 17); and from July 1, 2016 to June 30, 2019 (GC Ex18) Although there were minor variations in the unit descriptions over the years, basically the employees represented by the Charging Party Union performed traditional maintenance duties at the DTF, including the operation, mechanical maintenance of repair of refrigeration, hearing and air-conditioning machinery and general building maintenance. (GC Ex 18, p 1)

At some unknown point Respondent purchased the DTF facility. (Tr 358) The Intervenor apparently became aware of this in about December 2014. (Tr 260) Unbeknownst to the Charging Party Union, in collective bargaining negotiations between Intervenor and Respondent in 2015 Intervenor expressed its desire to perform the maintenance work at DTF. Respondent acceded to

[3] Local 547, International Union of Operating Engineers merged with Local 324 in 2009. (Tr 47)

Intervenor's request. Intervenor and Responded signed a letter dated October 22, 2015, which documented Intervenor's desire to perform the work. The letter further provided:

> The Company emphasized that in order to utilize [Intervenor] skilled trades employees at this facility, it must be cost competitive and efficient in relation to the current service contract. Taking into consideration the concerns of both parties, it is agreed that within ninety (90) days after ratification of the Local agreement, the parties will meet, discuss and agree to the necessary actions to perform skilled trades work at this facility that is as efficient and cost competitive as the current operating model.

(I Ex 16[d])

Respondent terminated its contract with Jacobs Industrial Service for maintenance at DTF. On February 2, 2017 Jacobs notified the Charging Party Union that it had been informed by Respondent that it would no longer be performing maintenance work and that the "maintenance services contract is getting turned over." Jacobs told the Charging Party Union that "Fordland" will come in and speak to employees about the "transition process." (GC Ex 19).

The "Launch Agreement"

The Launch Agreement established the parameters of the relationship between Respondent and the Intervenor at DTF. Intervenor and Respondent did not simply apply the existing national collective bargaining agreement to the employees, but rather negotiated a separate one year "Launch Agreement." The agreement reflects Respondent's concerns about transitioning from the operation of the DTF from their current Jacobs service contract to the Intervenor's bargaining unit.

The Launch Agreement expressly states the Company's position that use of the Intervenor's bargaining unit members "must be cost-competitive and efficient in relation to the current service

contract." (I Ex 9, p 1) The Launch Agreement contains a number of "conditions." The first enumerated condition is the implementation of a "Skilled Trades Coordinator;" as of the date of the hearing, six months into the one year launch period, this had not been accomplished. The agreement also provides that the Intervenor's bargaining unit employees will receive training on the DTF work to ensure that only qualified employees will be assigned to work at DTF.

Most notably, if the cost competitiveness and efficiency is not maintained or improved, the Launch Agreement may be terminated by Respondent upon 90 days notice, during which time the Respondent and Intervenor will meet to resolve disputes. (I Ex 9, p 2)

After Respondent terminated the Jacobs contract for maintenance work, it hired four of the five employees who had worked for Jacobs just prior to the transition: John Kerzawa, Carl Wynn, Jesse Miller and Kristian Peters. (Tr 130) The job offers for Respondent Ford Motor Co. were extended by Ford Land Research & Engineering Labor Relations representative Cheryl Chadwick.[4] (GC Ex 2-9) Beginning April 24, 2017 these four employees continued to work at DTF, performing the same work they had performed for Jacobs, working the same shift with the same tools. They continued to be supervised by Jacobs managers Ron Sirhan and Jason Maggard after being hired by Respondent, just as they had been when working for Jacobs. They continued to receive work orders through Jacobs manager Dave Knott through the Jacobs computer system. (Tr 102, 106-8, 127-28; 131,173,176,181-82, 227-31)

The four Jacobs employees who had been represented by the Charging Party Union were joined by two additional employees who were represented by the Intervenor: Carl Smith and George

[4] Ford Land is the real estate division of Respondent Ford Motor Co. (Tr 565)

Dusaj. (Tr 132, 197) These six employees performed DTF maintenance work from April 24, 2017 forward.

In a discussion after the April 24, 2017 transition it is uncontradicted Respondent Supervisor Eric Gerling[5] and Jacobs Supervisor Ron Sirhan employees that it would be "business as usual," just to keep working as they had before. It is uncontradicted that Gerling said that they wanted Intervenor's employees to work more like the existing employees had rather than having DTF employees function as Intervenor's bargaining unit (Tr 194-95)

Kristian Peters testified that he understood that he was protected from bumping for one year of employment. (Tr 117) He testified that his supervisor, Ron Sirhan, told him that they were "operating off the launch agreement between Ford and UAW, and business as usual for the first year." (Tr 121-22) The same sentiment was expressed by Jacobs supervisor Ron Sirhan to Kristian Peters in an email exchange, in which Sirhan stated that they were operating pursuant to the Launch Agreement, and that it was business as usual for the first year. (GC Ex 24)

Charging Party Request to Bargain

On April 13, 2017 the Charging Party Union sent a letter to Cheryl Chadwick, identified as the person to whom an inquiry should be sent. (Tr 53-54) The letter stated that the Charging Party Union represented a majority of employees in the following appropriate unit[6]:

> All employees employed at 8000 Enterprise Drive, Allen Park, Michigan in the operation, mechanical maintenance and repair of all refrigeration, heating and air-

[5] Respondent did not call Gerling as a witness.

[6] The unit reflected tracks the most recent collective bargaining unit. (GC Ex 18)

> conditioning machinery installed in said location and in the performance of general building maintenance which includes test operational support and troubleshooting, preventative maintenance activities, and repairs of existing building components, but excluding custodial maintenance, grounds keeping, operations maintenance, safety compliance inspections and major construction.

The letter requested recognition as the exclusive collective bargaining representative based on its legal obligation to bargain as a successor employer under NLRB v Burns International Security Services. (GC Ex 12)

Respondent Refusal to Bargain

On April 24, 2017 Respondent replied to this request for recognition, stating:

> Currently, Ford Motor Company does not classify any employees as Operating Engineers. Therefore we do not recognize the International Union of Operating Engineers as a unit that would represent any Ford Motor Company employees. All Ford Motor Company hourly employees employed at the Allen Park location are represented by the United Auto Workers (UAW).

(GC Ex 13)

Respondent's initial response to the Charging Party Union's request to bargain did not respond to the claim of majority status, but merely nonsensically stated that it does not classify employees as operating engineers and therefore it does not recognize the Charging Party Union as a unit that would represent its employees.

LEGAL ANALYSIS AND ARGUMENT

Respondent is a Successor Employer

The law as to successor employers is well settled under principles announced by the Supreme

Court in NLRB v Burns Security Services, 406 US 272 (1972) and refined in Fall River Dyeing Corp v NLRB, 482 US 27 (1987). The law is grounded in the most basic premise of the National Labor Relations Act, that employees should be free to choose if they want to be represented by a labor organization, and if so, which labor organization.

The basic principle established by Burns and its progeny is that a successor employer is obligated to bargain with the collective bargaining representative of its employees where such employees constitute a majority of employees, consisting of a substantial and representative complement, in an appropriate unit, and there is substantial continuity of the employing entity. The substantial continuity of the employing entity analysis is fact intensive; the Board considers the following factors:

> [W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products and basically has the same body of customers.

482 US at 43. However none of the factors are critical; the Board does not require that all conditions be met to establish substantial continuity, but rather, considers the "totality of circumstances," an approach approved by the Supreme Court in Fall River. 482 US at 43; Bendix Transportation Management Corp, 300 NLRB 1170, 1172 (1990).

The Supreme Court in Fall River also approved the Board's "employee perspective" analysis, that the continuity of the employing entity is judged from the perspective of the employee It observed:

> In conducting the analysis, the Board keeps in mind the question whether 'those employees who have been retained will understandably view their job situations as

> essentially unaltered.' This emphasis on the employees' perspective furthers the Act's policy of industrial peace. If the employees find themselves in essentially the same jobs after the employer transition, and if their legitimate expectations in continued representation by their union are thwarted, their dissatisfaction may lead to labor unrest.

482 US at 43 (citations omitted).

There is no real issue in this case that the employing entity has continued. The employees at DTF are performing the same work, on the same equipment, using the same tools, working for the same customer, working in the same physical location, under the same day-to-day supervision as before the transition. There was no hiatus between operations. For purposes of successorship analysis, it is not significant that the employees at issue were originally employed by a contractor of Respondent, and now are employed by Respondent directly, i.e. the work was brought in-house by Respondent rather than using a different third party independent contractor. The focus is properly on the work performed from the employee perspective, which is the same whether performed by Respondent itself, or an independent contractor. Bendix Transportation Management Corp, 300 NLRB 1170, 1172 (1990); Saks Fifth Avenue, 247 NLRB 1047 (1980) enf'd in pertinent part 634 F2d 681 (2d Cir 1987).

From the perspective of the DTF employees who worked for Jacobs, nothing has changed. Indeed their supervisors have emphasized to them that it's "business as usual," and that they wanted the DTF employees to work as they had before, not to change to work like those employees represented by Intervenor. Similarly, the Launch Agreement emphasizes the conditional nature of the one year experimental launch time period, that is terminable by Respondent upon 90 days notice. Rather than integrating DTF into the Intervenor's bargaining unit, the Launch Agreement

demonstrates that first year operated under special circumstances and operates to further preserve DTF's separate identity.

Substantial and Representative Complement

In Fall River, the Supreme Court approved the Board's "substantial and representative" complement rule, i.e. that the time at which the evaluation of whether an employer has hired a majority of employees represented by a labor organization for successorship purposes is when the employer has hired a "substantial and representative complement" of employees, not when the employer has hired a full complement of employees. The Court noted the analysis made by the Board:

> [W]hether the job classifications designated for the operation were filled or substantially filled, and whether the operation was in normal or substantially normal production. In addition, it takes into consideration the size of the complement on that date and the time expected to elapse before a substantially larger complement would be at work, . . . as well as the relative certainty of the employer's expected expansion.

482 US at 49 (internal quotation marks and citations omitted). The concept of substantial and representative complement comes from traditional representation law. As stated in the NLRB Board's Outline of Law and Procedure"

> In general, the Board finds an existing complement of employees substantial and representative when at least 30 percent of an existing complement is employed in 50 of the anticipated job classifications. Shares, Inc. 343 NLRB 455 fn 2 (2004).

NLRB Outline of Law and Procedure in Representation Cases, p 114. The factors used by the Board in this determination are set forth in Toto Industries (Atlanta), 323 NLRB 645 (1997).

While Respondent has been making predictions of future integration of the units, it is not

occurring at the present time, with very limited exceptions. Indeed DTF employees are being told that they will be operating under a "business as usual" model for a year. This one year wait and see approach is reinforced by the Launch Agreement which is terminable by Respondent with 90 days notice. It is Respondent's decision as to how it manages its business, but those choices have consequences for labor relations. Respondent is not entitled to the benefit of its vague and tentative unexecuted plans at the expense of the stable historical bargaining relationship which exists as to this bargaining unit, and with respect to which, from an employee perspective, there is no change.

Respondent predicts that it will need ten bargaining unit employees by the end of the year 2017 although DTF has operated with 6 employees (the equivalent of 4 operating engineers or in Respondent parlance Stationary Steam Engineer, and 2 electricians), the same general classifications that that existed before the transition. The only documentary evidence offered by either Intervenor or Respondent to support its contention that this employee expansion is necessary and has actually been planned is Respondent Exhibit 1 which refers to potential future employees being dispatched to DTF. Neither this document nor testimony reveals when such employees may be dispatched or for what period of time. Such speculative plans will not defeat a finding that a unit is substantial and representative. See General Engineering, 123 NLRB 586, 589 (1959). Indeed the Board found a substantial and representative complement in Fall River, affirmed by the Supreme Court based on less persuasive evidence than present in the instant case.

Appropriate Unit

Well established principles relating to appropriate unit support a finding that the pre-existing

DTF unit is appropriate.

Initially, it is well settled that a single facility is presumptively appropriate. A party challenging this presumption has the burden to affirmatively establish evidence to rebut the presumption. AVI Food Systems, 328 NLRB 426 (1999). The DTF unit as it existed prior to the transition was represented by Charging Party Union for 17 years and remains appropriate.

Further, the Board has long supported historically recognized bargaining units:.

> [L]ong established bargaining units will not be disturbed where they are not repugnant to the Act's policies. The Board places a heavy evidentiary burden on a part attempting to show that historical units are no longer appropriate. Indeed, compelling circumstances are required to overcome the significance of bargaining history.

Ready Mix USA, Inc., 340 NLRB 946, 947 (2003). (internal quotation marks and citations omitted).

The Board has recognized that the presumption for a single location unit is particularly strong where the employees had been historically recognized in a single location, notwithstanding a separate multi location unit. Dean Transportation, 350 NLRB 48, 58 (2007). Compelling circumstances must be present to overcome bargaining history. Children's Hospital 312 NLRB 920, 929 (1993); P. J. Dick Contracting, 290 NLRB 150, 151 (1988) (9 year bargaining history supports unit determination). This is not a case where the separate bargaining history is neutralized by a physical geographic move of employees and work and integration into a larger bargaining unit. Consolidated Film Industries, 207 NLRB 385, 387 (1973). Nor is the physical proximity of DTF to the other wind tunnels or facilities represented by Intervenor such that the single facility presumption is overcome. This is particularly true where as here, other facilities represented by Charging Party Union are in the same geographical area, and proximity as those represented by Intervenor.

Intervenor displayed a colorful map showing the locations represented by Intervenor; the map was dotted with facilities represented by Charging Party Union, a bargaining history with respect to such facilities that extends decades. (Tr 64-74, 611-28; GC Ex 20, 21, 29-32; I Ex 2; CP Ex 1) The fact that the facilities have different administrative designations or are owned by a subsidiary or division of Respondent does not dictate a different result. Such administrative niceties have little effect for the work from the perspective of the employee. 340 NLRB at 947. What is clear is that the Charging Party Union represents maintenance workers in same the geographical area as Intervenor. The two labor organizations have coexisted in separate proximate facilities for decades.

The issue is not whether a multi-facility unit might also be appropriate, or whether a single facility unit is the most appropriate. Given the single facility presumption and history, neither Respondent nor Intervenor can sustain its heavy burden to establish that the long established single facility DTF unit location is no longer appropriate in that it retains no self identity and it has merged into an overall unit. See AVI Food Systems, 328 NLRB 426, 429 (1999).

While a multi-facility unit may be more convenient for Respondent, such preference does not constitute cause to disregard a historical bargaining history or disregard the desires of its employees. While Intervenor may desire to increase its membership, it may not do so at the expense of employees Section 7 rights.

Accretion

The issue primarily disputed by Respondent and Intervenor is whether the DTF unit has

effectively been merged into the Intervenor's skilled trades unit. The question is one of accretion, whether the DTF unit has maintained a separate identity and remains an appropriate unit or has merged into Intervenor's unit.

The Board strictly applies its accretion standard because it denies employees the right to choose:

> In a most fundamental sense, the Board emphasized its 'restrictive' policy as to finding accretion to have occurred because of reluctance rooted in the policy of 'depriv[ing] employees of their basic right to select their own bargaining representatives.' This approach allows finding a valid accretion only when the employee group in question has little or no separate identification and, conversely, shows an overwhelming community of interest with the preexisting unit to which they are purportedly accreted.

Southfork Systems, Inc., 313 NLRB 274, 276 (1993).

A party claiming accretion has the burden of proof. Rice Food Markets, 255 NLRB 884 886. (1981):

> [A]ny party attempting to circumvent formal procedures for expansion or contraction of the bargaining unit bears a heavy burden of proving the legitimacy of such action.

NLRB v Coca-Cola Bottling Co., 936 F2d 122, 126 (2d Cir 1991).

This heavy burden has also been phrased in terms that the Board is reluctant to find an accretion and will not do so in a case where Section 7 rights are better preserved by a finding that no accretion has occurred. 340 NLRB at 946, 953. The Board will not find an accretion where an employee group sought to be added constitutes a separate appropriate unit. Id. at 954.

The accretion factors include operational integration, employee interchange, similarities of skills and functions, bargaining history and day-to-day supervision. Id at 953.

In evaluating the question of whether DTF retains a separate identity, it is significant that the

Intervenor and Respondent did not simply apply the existing collective bargaining agreement to the employees, but rather negotiated a one year "Launch Agreement" which falls substantially short of the comprehensiveness and certainty of a traditional collective bargaining agreement of the sort negotiated by Intervenor.. Most notably if the cost competitiveness and efficiency is not maintained or improved, the Launch Agreement may be terminated by Respondent upon 90 days notice, during which time the Respondent and Intervenor will meet to resolve disputes. (GC Ex 28, p 2)

In reality, it appears that Respondent and Intervenor have merely decided to conduct a one year experimental trial run, to see if the work at issue can be done by the Intervenor's bargaining unit employees maintaining and the cost and efficiency of having the work done by the Charging Party's bargaining unit employees. In addition to the conditional nature of the agreement, Respondent has an escape clause to terminate the agreement. Such terms of the Launch Agreement are not present in Intervenor's and Respondent's collective bargaining agreement.

The speculative nature of the relationship, terminable by Respondent, undermines the argument that DTF does not retain a separate identity. Indeed, the existence of the Launch Agreement, and the realities demonstrated by DTF employee testimony, demonstrate that there has not been a merger of the DTF unit into the Intervenor's skilled trades unit. In addition to operating under the Launch Agreement, DTF employees have been instructed to operate "business as usual," i.e. as it existed prior to the transition. The day-to-day supervision at DTF remains the same as it existed prior to the transition and is different than that of Intervenor's unit. While Respondent and Intervenor may argue certain factors such as integration of operations and similarity of wages and benefit favor an accretion finding, it is significant that these are factors are controlled by Respondent

who is in a position to benefit from its refusal to bargain with the Charging Party Union.

Additionally although presumably Intervenor and Respondent will argue the existence of interchange of duties between DTF and other Intervenor represented facilities, in fact there are only isolated instances in which an employee from Intervenor's bargaining unit has worked at DTF since the transition for a limited number of hours. More importantly, there are no instances in which a DTF employee originally employed by Jacobs employee has worked in another facility either before or after the transition. Only George Dusaj, assigned to DTF after the transition, testified that he may have worked overtime two or three times at another building. (Tr 493)

While there has been some "training" conducted for non DTF employees at DTF, such training should not be considered as interchange as the employees were only familiarized with the equipment and building. At most this training opens up the potential for future interchange. However, even if the training is viewed as interchange the evidence of interchange does not negate the overwhelming evidence of other factors which disfavor an accretion finding.

Viewed in its totality neither Respondent or Intervenor has satisfied its heavy burden to demonstrate that the DTF no longer retains a separate identity, in view of its well established bargaining history, and identity of work skills and duties, and day to day supervision. Accordingly, Respondent violated the Act when it recognized the Intervenor as the representative of its employees and refused to bargain with the Charging Party Union as a successor employer.

CONCLUSION

The Charging Party requests that the Administrative Law Judge find the violations of the Act

as alleged in the General Counsel's Complaint and that the relief requested and any other appropriate relief be granted.

BY: s/Amy Bachelder
AMY BACHELDER (P26401)
SACHS WALDMAN
2211 E. Jefferson Ave. Suite 200
Detroit, Michigan 48207
Email: abachelder@sachswaldman.com
(313) 965-3464

Dated: December 22, 2017

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CERTIFICATE OF SERVICE

I, Amy Bachelder, certify that on December 22, 2017 I electronically filed Charging Party's Brief to Administrative Law Judge and this Certificate of Service with the National Labor Relations Board and provided a copy via electronic mail to:

Stephen M. Kulp, Esq.: *skulp@ford.com*
William J. Karges, Esq.: *wkarges@uaw.net*
Philip Mayor, Esq.: *pmayor@uaw.net*
Robert Drzyzga, Esq.: *robert.drzyzga@nlrb.gov*

BY: s/Amy Bachelder
AMY BACHELDER (P26401)
SACHS WALDMAN
2211 E. Jefferson Ave. Suite 200
Detroit, Michigan 48207
Email: abachelder@sachswaldman.com
(313) 965-3464

Dated: December 22, 2017